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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/877,757	06/08/2001	Elizabeth Varriano-Marston	MARS93-DIV	3933

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EXAMINER

PATTERSON, MARC A

ART UNIT	PAPER NUMBER
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1772

DATE MAILED: 01/03/2003

6

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/877,757

Applicant(s)

VARRIANO-MARSTON,
ELIZABETH

Examiner

Marc A Patterson

Art Unit

1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 October 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14, 21 and 22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14, 21 and 22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

Art Unit: 1772

DETAILED ACTION

WITHDRAWN REJECTIONS

1. The 35 U.S.C. 112 second paragraph rejections of Claims 1 – 3, 7 and 13 – 14, 35 U.S.C. 102(b) rejection of Claims 1 – 3, 5 – 12 and 14 as being anticipated by De Moor (U.S. Patent No. 6,013,293), 35 U.S.C. 103(a) rejection of Claim 13 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) and 35 U.S.C. 103(a) rejection of Claim 4 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Clarke et al. (U.S. Patent No. 6,376,032), of record on page 2 of the previous Action, are withdrawn.

REPEATED REJECTIONS

2. The 35 U.S.C. 112 second paragraph rejections of Claims 5 – 6 and 9, of record on page 2 of the previous Action, are repeated.

NEW REJECTIONS

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1 – 14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. With regard to Claim 1, the phrase ‘said set of microperforations are calculated to control’ is indefinite, because it is unclear if the microperforations control or not. For purposes of examination, it will be assumed that the microperforations control. The phrase ‘registered target

Art Unit: 1772

area is indefinite, as it is unclear exactly what area is being claimed. For purposes of examination, the phrase will be assumed to mean any area on the packaging.

5. Claims 8 and 10 – 11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. With regard to Claim 8, the phrase 'lidding film' is indefinite, as it is unclear whether a lid or a film is being claimed. For purposes of examination, it will be assumed that a lid is being claimed. With regard to Claim 10 – 11, the phrases 'upper portion' and 'lower portion,' are indefinite as it is unclear what locations are being claimed. For purposes of examination, the phrases will be assumed to refer to any location.

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1 – 3, 5 – 12, 14 and 21 – 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156).

With regard to Claims 1 – 2 and 10 – 11, De Moor discloses an improved packaging (atmosphere control member; column 4, lines 36 – 46) for establishing optimum atmospheric

Art Unit: 1772

conditions for respiring produce (respiring biological materials; column 4, lines 36 – 46), comprising a polymeric material (polyethylene; column 9, lines 9 – 25); the film is microporous (column 9, lines 9 – 25); the microporous film controls the oxygen and carbon dioxide to specified concentrations within the package containing the respiring produce (thus an optimum atmospheric condition is set; column 4, lines 46 – 67). With regard to the claimed aspect of the film comprising ‘microperforations,’ Kurachi et al teach that a microporous film is a film having a large number of microperforations (column 1, lines 20 – 22 of Kurachi et al.).

With regard to Claim 3, the polymeric material disclosed by De Moor is heat – sealed (column 4, lines 46 – 67).

With regard to Claims 5 – 6, the polymeric material disclosed by De Moor provides a flux of 50,000 cc/100 in² atm day (column 5, lines 35 – 51).

With regard to Claim 7 – 9, a bag is formed of the polymeric material disclosed by De Moor, which is heat sealed (column 4, lines 47 – 67; column 7, lines 58 – 67; column 8, lines 1 – 14); the polymeric material is therefore also a heat sealed lid and a container, and has a thickness greater than 8 mil (the thickness, as stated above, is 0.65 mm).

With regard to Claim 12, the film disclosed by De Moor is gas – permeable (column 5, lines 35 – 51) and is therefore not occluded.

With regard to Claim 14 and newly submitted Claim 22, the film disclosed by De Moor has a carbon dioxide transmission rate that is four times greater than the oxygen transmission rate (column 6, lines 25 – 26).

Art Unit: 1772

8. Claims 13 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156).

De Moor and Kurachi discloses a microporous packaging as discussed above. With regard to Claim 13 and newly submitted Claim 21, De Moor fails to disclose a packaging having an average pore diameter of 110 – 400 microns. However, De Moor discloses a packaging having an average pore diameter of 0.24 microns (a pore size of 0.24 microns; column 6, lines 30 – 32). Therefore, the pore diameter would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end use of the product, absent a showing of unexpected results. It therefore would be obvious for one of ordinary skill in the art to vary the pore diameter, since the pore diameter would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end result as shown by De Moor and Kurachi. *In re Boesch and Slaney*, 205 USPQ 215 (CCPA 1980).

9. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156) and further in view of Clarke et al. (U.S. Patent No. 6,376,032).

De Moor and Kurachi discloses a microporous packaging as discussed above. De Moor fails to disclose a film thickness of 0.4 to 8 mil.

Clarke et al teach a thickness of 0.03 – 0.65 mm for microporous packaging (0.03 – 0.65 mm is 1 – 20 mil column 5, lines 48 – 49) for the purpose of packaging fresh produce (column 1, lines 18 – 20).

Art Unit: 1772

It therefore would have been obvious for one of ordinary skill in the art at the time Applicant's invention was made to have provided for a film thickness of 0.4 to 8 mil in De Moor and Kurachi in order to packaging fresh produce as taught by Clarke et al.

10. The declaration under 37 C.F.R. 1.132 filed October 21, 2002 is insufficient to overcome the 35 U.S.C. 102(b) rejection of Claims 1 – 3, 5 – 12 and 14 as being anticipated by De Moor (U.S. Patent No. 6,013,293), 35 U.S.C. 103(a) rejection of Claim 13 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) and 35 U.S.C. 103(a) rejection of Claim 4 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Clarke et al. (U.S. Patent No. 6,376,032), of record on page 2 of the previous Action. The declaration provides evidence indicating that both a need and a demand exist in the packaging market for the claimed invention. However, as stated above, the claimed invention is rendered obvious by De Moor in view of Kurachi et al.

ANSWERS TO APPLICANT'S ARGUMENTS

11. Applicant's arguments regarding the 35 U.S.C. 112 second paragraph rejections of Claims 1 – 3, 7 and 13 – 14, 35 U.S.C. 102(b) rejection of Claims 1 – 3, 5 – 12 and 14 as being anticipated by De Moor (U.S. Patent No. 6,013,293), 35 U.S.C. 103(a) rejection of Claim 13 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) and 35 U.S.C. 103(a) rejection of Claim 4 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Clarke et al. (U.S. Patent No. 6,376,032), of record on page 2 of the previous Action, have been considered

Art Unit: 1772

and have been found to be persuasive. The rejections are therefore withdrawn. The new 35 U.S.C. 112 second paragraph rejections of Claims 8 and 10 – 11, 35 U.S.C. 102(b) rejection of Claims 1 – 3, 5 – 12, 14 and 21 – 22 as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156), 35 U.S.C. 103(a) rejection of Claim 13 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156). 35 U.S.C. 103(a) rejection of Claim 4 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156) and further in view of Clarke et al. (U.S. Patent No. 6,376,032) above are directed to amended Claims 1 – 14 and 21 – 22.

Applicant's arguments regarding the 35 U.S.C. 112 second paragraph rejection of Claims 5 – 6 and 9, of record on page 2 of the previous Action, have been carefully considered but have not been found to be persuasive for the reasons set forth below.

Applicant argues, on page 3 of Paper No. 5, that the term 'flux' has inherent units for a packaging material. However, as the term 'flux' is used in many technologies other than packaging, and thus has different units, it is still necessary to claim the stated units.

Applicant also argues, on page 3, that the meaning of the term 'semi – rigid' is well known in the art, and the sample which has been provided by Applicant illustrates the meaning of the phrase. However, as stated on page 2 of the previous Action, the meaning of the phrase is relative.

Conclusion

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marc Patterson, whose telephone number is (703) 305-3537. The

Art Unit: 1772

examiner can normally be reached on Monday through Friday from 8:30 AM to 5:00 PM. If attempts to reach the examiner by phone are unsuccessful, the examiner's supervisor, Harold Pyon, can be reached at (703) 308-4251. FAX communications should be sent to (703) 872-9310. FAXs received after 4 P.M. will not be processed until the following business day.

Marc A. Patterson, PhD.

Marc Patterson
Art Unit 1772

Harold Pyon
HAROLD PYON
SUPERVISORY PATENT EXAMINER
1772

12/30/02